IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. 38

JAMES G. GLOVER, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF
OF RESPONDENT ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

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AUTHORITIES CITED.

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STATEMENT OF THE CASE.

This is another case where railroad employees have asserted claims based upon their collective bargaining agreement but have at the same time sought to by-pass both the grievance procedure of the agreement and the National Railroad Adjustment Board.[1]

[1] See Railway Labor Act, Sec. 3, First, 45 U. S. C., § 153, First.

The petitioners are employees of the Frisco Railroad, work in the job classification of Carmen Helpers, and are represented by the Brotherhood of Railway Carmen. Alleging in their complaint that their wages, working conditions, and employment rights are covered by the collective bargaining agreement in effect between the Frisco and the Brotherhood, they asserted that apprentices are being assigned to certain work "instead of calling out [petitioners] to do said work as required by the Collective Bargaining Agreement as properly and customarily interpreted" and that the denial of the work to them "has been contrary to previous custom and practice by [respondents] in regard to seniority" (A. 7).

Following submission of the case on briefs and oral argument, the district court dismissed the action on the ground that the allegations of the complaint affirmatively showed that the petitioners had not availed themselves of their contractual and administrative remedies and that the conclusionary averment that such remedies were inadequate was insufficient ground to give the court jurisdiction over the dispute (A. 14-15). Petitioners thereafter requested leave to amend to attempt to cure "certain" of the deficiencies pointed out by the Court (A. 16-17), and this request was granted (A. 18). The amendment emphasized, however, their recognition of the existence of their contractual and administrative remedies while alleging no facts showing that petitioners had pursued them (A. 18-20). The district court accordingly held that the amendment "does not cure the defects pointed out in the memorandum opinion of this Court" and dismissed the action (A. 24). The Fifth Circuit, Judges Rives, Goldberg and Dyer, affirmed (A. 28).

We submit that the decisions below are entirely sound and correct applications of the governing legal principles and should be affirmed by this Court.

ARGUMENT.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROVIDES THE REMEDY WHICH THE PETITIONERS SEEK THROUGH THIS PETITION.

Petitioners' claim of racial discrimination against the Frisco is based wholly and solely on the Frisco's collective bargaining agreement with the Brotherhood. The decision of the district court dismissing the complaint as to the railroad was based and affirmed on two separate and independent grounds: (1) the Railroad Adjustment Board's exclusive jurisdiction over the contractual claim and (2) petitioners' failure to use remedies available to them under the bargaining agreement. As will hereafter appear, the decisions below are supported on both grounds by abundant statutory and case authority.

Petitioners argue, however, that their claim of racial discrimination requires a departure from this authority. In this regard the district court which dismissed the complaint is wholly in agreement with petitioners where suit is brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C., § 2000e et seq., and so held in a case involving one of the petitioners. *Dent v. St. Louis-San Francisco R. Co.*, 265 F. Supp. 56 (N. D. Ala. 1967). This case, as the district court noted in the decision below, involved a complaint alleging racial discrimination by the Frisco filed on behalf of the same class of employees as is involved in this case and seeking identical relief. The district court held that neither recourse to the Adjustment Board nor exhaustion of contractual grievance procedures were prerequisites to the court's jurisdiction in a Title VII action:

> One of the questions before the court concerns the necessity of the plaintiff first pursuing remedies

> available under the collective bargaining agreement or before the National Railroad Adjustment Board. The court agrees with the position, taken by the plaintiff and the Commission, that the principle of *Republic Steel Corp. v. Maddox* should not be applied to actions brought under Title VII of the Act and therefore holds that remedies under the collective bargaining agreement or before the Adjustment Board need not be pursued prior to the institution of an action under this title.
>
> 265 F. Supp., pp. 57-58.

Title VII of the Civil Rights Act of 1964 and specifically the district court's position in the *Dent* case provide both a body of substantive law and remedies in the federal courts to protect petitioners against the wrongs alleged in the complaint. If there was once a need for this Court to contrive an unprecedented remedy in the courts for railroad employees alleging racial discrimination under a bargaining agreement against their employer, Congress eliminated this need in Title VII as construed by the district court. Accordingly on the basis of the authority to be discussed, the decision below should be affirmed.[2]

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[2] With respect to the *Dent* complaint, petitioners may argue that the district court nevertheless dismissed it. This is true. On March 10, 1967, the court on the basis of a lengthy opinion dismissed the complaint on the ground that the Equal Employment Opportunity Commission had not attempted conciliation of Mr. Dent's grievance with the company, 265 F. Supp. 56 (N. D. Ala. 1967). Had Mr. Dent at the time of dismissal urged the Commission to conciliate his grievance and had conciliation been unsuccessful, the claim asserted in this suit could be well along its way toward trial in the district court.

II. THE NATIONAL RAILROAD ADJUSTMENT BOARD HAS EXCLUSIVE JURISDICTION OVER THE CLAIM MADE BY PETITIONERS IN THIS SUIT.

A. The Decisions of This Court.

This Court has repeatedly for almost two decades held that Congress conferred exclusive jurisdiction in the National Railroad Adjustment Board to adjust contractual disputes between active railroad employees and their employers.[3] The leading case, *Slocum v. Delaware and L. & W. R. Co.*, 339 U. S. 239 (1950), involved a dispute between two unions over the scope of their agreements with the railroad. In concluding that the Board had exclusive jurisdiction to adjust this dispute the Court emphasized three central facts in that case: (1) the dispute concerned an "interpretation of an existing bargaining agreement," (2) settlement of the dispute would "govern the future relations of those parties," (3) the type of grievance was considered "a potent cause of friction." 339 U. S. at 242.

On the basis of these facts, the Court held:

> The [Railway Labor] Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad

[3] The sole exception to this rule, which is expressed in *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630 (1941) and *Walker v. Southern Railway Co.*, 385 U. S. 196 (1966), is that a discharged employee accepting his discharge as final may sue for money damages in the courts. As the claim here involves current railroad employees and the future relationship between these employees and their employer, it obviously does not fall under the rule of *Moore* and *Walker*.

> jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems.
>
> * * * * * * * * *
>
> We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive.
>
> 339 U. S. at 243-244.

The theme of *Slocum* that Congress intended the Board to have exclusive jurisdiction over disputes growing from railroad bargaining agreements has been repeated often by this Court since *Slocum*. The key notes of this theme are: (1) the Board is peculiarly well suited to solve contractual disputes arising in the railroad labor world and (2) exclusive jurisdiction in the Board over contractual disputes will provide desirable uniformity.[4]

In *Brotherhood of R. T. v. Chicago R. & I. R. Co.*, 353 U. S. 30 (1957), this Court, after an extensive discussion of legislative history, said:

> "This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history."
>
> 353 U. S. at 39.

Pennsylvania R. R. Co. v. Day, 360 U. S. 548 (1959), concerned whether a retired railroad employee could by-

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[4] See *Order of R. Conductors v. Southern R. Co.*, 339 U. S. 255 (1949), decided on the same day as *Slocum*.

pass the Board and take a railroad bargaining agreement dispute directly to court. The Court held no:

> Since the Board has jurisdiction it must have exclusive primary jurisdiction. All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service.
>
> 360 U. S. at 552.

Though a majority of six justices joined the *Day* opinion, the dissenters expressed no doubt whatever that the Adjustment Board had exclusive jurisdiction over bargaining agreement disputes of active employees:

> It is clear, however, that active employees work together from day to day; their work frequently makes them live together in the same neighborhood; they, in fact, constitute almost a separate family of people, discussing their interests and affairs, and airing among themselves their complaints and grievances against the company. In such an atmosphere individual dissatisfactions tend to become those of the group, breeding industrial disturbances and strikes.
>
> 360 U. S. at 557.

Several years later in *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U. S. 33 (1963), the Court once again stated that exclusive jurisdiction to settle contract disputes in the railroad world lay in the Adjustment Board:

> The several decisions of this Court interpreting § 3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes.

> . . . Similarly, an employee is barred from choosing another forum in which to litigate claims arising under the collective agreement. . . . [T]he remedies provided for in § 3 First were intended by Congress to be the complete and final means for settling minor disputes.
>
> 373 U. S. at 38, 39.

Finally, in *Gunther v. San Diego and Arizona E. R. Co.*, 382 U. S. 257 (1965), a unanimous Court re-emphasized that the Adjustment Board was peculiarly qualified to adjudicate claims of railroad employees growing from their bargaining agreement and that jurisdiction to adjudicate these claims had been vested by Congress solely and exclusively in the Board:

> The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices.
>
> • • • • • • • •
>
> Also in Locomotive Engineers v. Louisville & Nashville R. Co., 373 U. S. 33, Court said that prior decisions of this Court made it clear that the Adjustment Board provisions were to be considered as "compulsory arbitration in this limited field," p. 40, "the complete and final means for setting minor disputes," p. 39, and "a mandatory, exclusive, and comprehensive system for resolving grievance disputes," p. 38.
>
> 382 U. S. at 261, 263-264.

Unless this Court is suddenly to disregard the intent of Congress and the reasoning of the line of cases from *Slocum* to *Gunther*, the conclusion in this case is abso-

lutely inescapable. The Adjustment Board has exclusive jurisdiction over the contractual dispute between the petitioners and the Company.[5] All of the fourteen petitioners are current employees. Their dispute vitally concerns the promotional rights of an untold larger number of employees whom they seek to represent in a class action. Their claim on its face calls not for a simple common law interpretation of an existing bargaining agreement but for an understanding of "custom and practice" in the railroad world. And as much as any railroad dispute reviewed by this Court in the above decisions, the dispute here is likely to cause friction leading to a possible strike. A case, therefore, could not be more closely tailored to fit within the exclusive jurisdiction of the Adjustment Board as described by this Court in its many recent decisions.

B. The Decisions of the Lower Federal Courts.

The Circuit Courts and the District Courts have held uniformly under the *Slocum* line of cases that the Adjustment Board has exclusive jurisdiction to hear contractual claims of the type asserted here. The Eighth Circuit in *Howard v. St. Louis-San Francisco Railway Co.*, 361 F. 2d 905 (8th Cir. 1966, cert. den., 385 U. S. 986 (1967)), stated in a case involving race discrimination charges substantially identical to the ones made here:

> Beyond doubt the Paragraph 15 complaints are "minor" disputes within the meaning of the Act.

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[5] It is well settled that an employee may take a grievance to the Board without the aid of his bargaining representative. *E. g. Thompson v. New York Central R. Co.*, 361 F. 2d 137 (2d Cir. 1966):

> There is no doubt that individual employees, such as the plaintiffs here, who interests vis-a-vis their employer are hostile to those of their union, have standing to present grievances to the Adjustment Board, irrespective of the union's position.
>
> 361 F. 2d at 143.

> This being so the train porters were required, as a prerequisite to relief in the federal courts, to pursue their remedies in accordance with the procedures embodied in their labor agreement, and the provisions of the Railway Labor Act. . . . None of the train porters ever progressed a timely claim to the Adjustment Board, or pursued any contractual or statutory remedies. Having failed to exhaust their contractual and administrative remedies, appellant is precluded from resorting to the federal courts for resolution of the Paragraph 15 grievances.
>
> 361 F. 2d at 912.

In *Thompson v. New York Cent. R. Co.*, 361 F. 2d 137 (2d Cir. 1966), the Second Circuit held in a similar case:

> [I]t is perfectly clear that the question of discrimination *vel non* depends upon the interpretation to be given to the 1964 agreement, as implemented by the August 18, 1965 agreement, and that this question of interpretation must be made by the Adjustment Board and not by the courts.
>
> 361 F. 2d 143.

Prior to rendering the decision below the Fifth Circuit in 1960 and 1964 had explained:

> "The Supreme Court has held beginning with Slocum . . . that, in an action by a railroad employee against his employer seeking an interpretation or ascertainment of rights under the contract of employment, when the vindication of such claimed right requires the interpretation or construction of the terms of the contract, the Adjustment Board established by the Railway Labor Act has exclusive jurisdiction." *Fingar v. Seaboard Air Line R. Co.*, 277 F. 2d 698, 700 (5th Cir. 1960).

• • • • • • •

> "It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedures set forth in the contract." *St. Louis, San Francisco & Texas R. Co. v. Railroad Yardmasters of America*, 328 F. 2d 749, 753-754 (5th Cir. 1964), *cert. denied*, 377 U. S. 980 (1964).

For similar holdings in the district courts see, *e. g.*, *Nunn v. Missouri Pacific R. Co.*, 248 F. Supp. 304 (E. D. Mo. 1965) and *Wade v. Southern Pacific Co.*, 243 F. Supp. 307, (S. D. Tex. 1965).

There is thus a firm and uniform bedrock of cases decided at all levels of the federal court system to support the decisions below that the Adjustment Board has exclusive jurisdiction over petitioners' claim. We turn now to the several arguments of petitioners that these cases are not applicable here.

C. The Fair Representation Cases Do Not Create an Exception to the Exclusive Jurisdiction Rule.

Petitioners nevertheless argue, despite the line of cases from *Slocum* to *Gunther*, that the Adjustment Board does not have exclusive jurisdiction over this dispute. To support their position, petitioners first point to the fair representation cases commencing with *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944).[6]

These cases, petitioners contend, create an exception to the rule that disputes between employees and employers

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[6] For other cases in this line see *Tunstall v. Brotherhood of Locomotive Firemen and Engine Men*, 323 U. S. 210 (1944); *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952); *Graham v. Brotherhood of Railroad Firemen*, 338 U. S. 232 (1949); *Conley v. Gibson*, 355 U. S. 41 (1957).

requiring the interpretation and application of a railroad bargaining agreement must be submitted to the Board. The shortcoming of this contention which is both obvious and fatal is that the *Steele* line of cases concerns neither disputes between employees and employers nor disputes calling for the interpretation or application of collective bargaining agreements. This line of cases involves instead disputes between unions and employees arising almost completely apart from the bargaining agreement. Chief Justice Stone defined the scope of these cases in the opening sentence of the Court's opinion in *Steele*:

> "The question is whether the Railway Labor Act . . . . imposes on a labor organization . . . the duty to represent all the employees in the craft without discrimination because of their race . . ."
>
> 323 U. S. at 193-194.

The Court went on to say in *Steele* that it found no "differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board." *Id.* at 205.

Likewise in *Brotherhood v. Howard*, 343 U. S. 768 (1952), when the same issue was raised between railroad employees and their union, this Court repeated that "the claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum . . . This dispute involves the validity of the contract, not its meaning." *Id.* at 774. Finally in *Conley v. Gibson*, 355 U. S. 41 (1957), relied on heavily for petitioners, a unanimous Court stated:

> "This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. . . . Furthermore, the contract be-

tween the Brotherhood and the Railroad will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent."

Id. at 44-45.

Therefore, petitioners' argument that the fair representation line of cases supports their contention that a district court has jurisdiction to adjust their claim against their employer based solely on the bargaining agreement ignores entirely the parties, the issues, and the holdings on the fair representation cases.

D. Petitioners' "Four Points" Based on "Public Policy" Do Not Support Departure From the Exclusive Jurisdiction Rule.

1. These "points" should be argued to Congress and not to this Court.

Petitioners next raise four "points" based on "public policy" which, they suggest, give good reason for stripping the Adjustment Board of its exclusive jurisdiction in this case. It is hard to see how these policy considerations are properly addressed to this Court after almost twenty years of uninterrupted pronouncements that Congress rather than the Court gave the Board exclusive jurisdiction to hear contractual disputes between current railroad employees and their employer. Congress, which amended the Railway Labor Act in 1966, was at that time very definitely aware of this Court's decisions from *Slocum* to *Gunther*.[7] The House report on the 1966 amend-

[7] Oral and written statements made at hearings on the 1966 amendments both in the House and the Senate are replete with discussions of the *Slocum* line cases. See, *e.g.*, oral statement of Mr. Crotty, Hearings before the House Subcommittee on Transportation and Aeronautics on H. R. 701, H. R. 704, H. R. 706, 89th Cong., 1st Sess., pp. 11-22; Written statement of Mr. Schoene, Hearings before the Senate Subcommittee on Labor, H. R. 706, 89th Cong., 2d Sess., pp. 9-19.

ments referred specifically to *Union Pacific v. Price*, 360 U. S. 602 (1959), *Pennsylvania R. v. Day*, *supra*, and *Brotherhood of R. Trainmen v. Chicago & Illinois R.*, *supra*, and stated, "(w)hen read in conjunction with other Supreme Court decisions, these decisions make this compulsory arbitration system the exclusive means by which employees may obtain decisions on minor grievances."[8] Likewise in the Senate, Senator Morse, Chairman of the Labor Subcommittee, ordered the *Gunther* decision appended to the report of the Senate hearings[9] and in the hearings quoted from it at length.[10] If Congress thought that the rule of exclusive jurisdiction as expressed in *Slocum* and the cases following it was contrary to good public policy, it could have amended the rule. But instead, quite obviously aware of the rule, Congress left it wholly in tact.

2. **The "points" fail on their own lack of merit.**

Even though legislative inaction in 1966 must be taken as congressional approval of the exclusive jurisdiction rule, respondent will meet each of petitioners' four "points" on its merits to show that rather than supporting departure from the exclusive jurisdiction doctrine these points instead illustrate the doctrine's solid validity as applied to this case.

Petitioners' "Point No. 1". Petitioners state that the Adjustment Board should not have exclusive jurisdiction in this case because it lacks the power to redress alleged discrimination by the Union. If one should ask why this lack of power should deprive the Board of exclusive jurisdiction, the answer will not be found in petitioners' brief.

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[8] H. R. Rep. No. 1114, 89th Cong., 1st Sess. (1965), p. 15.

[9] Hearings before the Senate Subcommittee on Labor on H. R. 705, 89th Cong., 1st Sess., p. 43.

[10] *Id.* at 47.

The best guess at what petitioners are driving at is that the Adjustment Board cannot fashion an adequate remedy in this case. As an answer to this proposition it is sufficient to say that the Board has the power to entitle petitioners to promotion to carmen and back pay. Nowhere have petitioners asked for more.

Petitioners' "Point No. 2". Petitioners' next point is that the Board is "stacked" against them and therefore would be unable to render an impartial decision in this case. An initial answer to this contention is that it has been rejected repeatedly by federal and state courts throughout the country. See *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F. 2d 861, 867 (4th Cir. 1955), *cert. denied*, 350 U. S. 839 (1955), *Johns v. Baltimore & Ohio R. Co.*, 118 F. Supp. 317, 322 (N. D. Ill. 1954), *aff'd per curiam*, 347 U. S. 964 (1954), *United Railroad Operating Crafts v. Pennsylvania R. Co.*, 212 F. 2d 938, 942 (7th Cir. 1954), *Cook v. Brotherhood of Sleeping Car Porters*, 309 S. W. 2d 579, 589-590 (Mo. 1958), *cert. denied*, 358 U. S. 817 (1958). Furthermore it is completely without merit as a matter of policy.

First, the Company assumes that petitioners are not stating in "Point No. 2" that the Board might abet, in violation of the United States Constitution, any racially discriminatory action alleged in the complaint.[11] Presumably, instead, what the petitioners are contending is that in this case and any other case where a group of active railroad employees allege that they are disadvantaged by operation of an agreement between the employer and the union, the Board, "representing" the employer and the union is likely not to be an impartial tribunal to settle the dispute. Therefore, according to

[11] If this is petitioners' contention, their premise is wholly without factual foundation and even if the Board were to violate the equal protection guarantees of the Constitution the federal courts would clearly have jurisdiction to redress the violation.

petitioners, Congress intended that the courts be given jurisdiction over such contractual claims.

There could hardly be an argument more calculated to create lack of uniformity in the interpretation of railroad labor contracts than this one. Railroad employees are, relative to one another, advantaged and disadvantaged daily by joint decisions of management and union. As this Court said unanimously in *Ford Motor Company v. Huffman*, 345 U. S. 330 (1953), in the labor world, "the complete satisfaction of all who are represented is hardly to be expected." *Id.* at 338. Certainly Congress, which, as this Court has repeatedly emphasized, established exclusive jurisdiction in the Board and thereby promoted uniformity in the interpretation and application of railroad bargaining agreements, did not intend that every group of dissatisfied railroad employees should have access to the federal courts as soon as a shop steward advised them against filing a complaint with the union. Yet petitioners' "Point No. 2" has no other conceivable meaning.

Petitioners' "Point No. 3". The third "point" is that limited review on appeal from a decision of the Board is a denial of the due process clause of the Fifth Amendment.[12] This argument, if accepted, would require at the very least the overruling of the entire *Slocum* to *Gunther* line of cases and ultimately would result in the demise of the entire structure of labor arbitration law. Hopefully, this Court will not find this course of action advisable.

Petitioners' "Point No. 4". Petitioners' final "point" to support a departure from the exclusive jurisdiction rule rests on what petitioners call "a new body of public pol-

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[12] The inequality in appeal from the Adjustment Board noted by this Court in *Walker v. Southern R. Co., supra*, has been eliminated by the 1966 amendments to the Railway Labor Act. See illustration of amendments contained in S. Rep. No. 1201, 89th Cong., 1st Sess. (1966), at p. 11.

icy'' manifesting itself in the Labor Management Reporting and Disclosure Act and in the Civil Rights Act of 1964. This ''point'' only emphasizes the many channels to relief available to petitioners to redress alleged unlawful discrimination. As stated in Part I above, most damaging to petitioners' argument is the presence of Title VII of the Civil Rights Act. The remedies under Title VII were available to petitioners when this suit was filed and are now. This remedy being available, it is hardly in the interest of ''public policy'' to disregard the policy behind the exclusive jurisdiction rule in order to give petitioners an alternative, contrived and unprecedented entry to the federal courts.

E. Petitioners' Contention That Five Years May Be Required to Adjudicate Their Claim Before the Adjustment Board is Wholly Erroneous.

Generously sprinkled throughout petitioners' brief in the Fifth Circuit and the petition here (incorporated in large part in the brief) are various assertions that a delay of some five years will attend adjudication of petitioners' claim before the Adjustment Board. In going outside the record to make these assertions petitioners display a remarkable ignorance of the real facts. Shortly before the complaint was filed, Representative Williams testified before the House Subcommittee on Transportation and Aeronautics that '''At the current rate of productivity . . . it would take a little over a year to dispose of all the cases on the docket of the Second Division''[13] of the Board which has jurisdiction over petitioners' grievance.[14]

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[13] Hearings before House Subcommittee on Transportation and Aeronautics, *supra*, p. 4.

[14] The Railway Labor Act, Sec. 3, First (h), provides:

"The said Adjustment Board shall be composed of four divisions . . . and the said divisions as well as the number of their members shall be as follows:

Second division: To have jurisdiction over disputes involving . . . car men. . . ."

Senator Morse in the committee report authored by him on the 1966 amendments stated, "The Board procedure for handling disputes has worked expeditiously in the Second and Fourth Divisions. . . . The Second Division which handles an average of 247 cases a year, has a backlog of little over one year's work."[15] The House report, prepared by Representative Staggers, contains a substantially identical statement.[16] It is therefore impossible for petitioners to conclude honestly that any burdensome period of time will be required for the adjudication of their claim. As a matter of fact, had petitioners resorted to the Adjustment Board, their claim would have already been adjudicated and not be in this Court on a procedural point.

F. Summary.

Petitioners' argument that the Adjustment Board does not have exclusive jurisdiction to hear their claim against the Frisco based solely on their bargaining agreement fails utterly at every thrust. It is defeated first and conclusively by the *Slocum* to *Gunther* line of cases ratified in 1966 by the Congress. Petitioners' detouring contention that the fair representation cases create an exception to the exclusive jurisdiction rule ignores not only the facts and reasoning of the *Slocum* and *Gunther* cases but also that of the fair representation cases. Finally, the four-pronged policy attack is not only out of place in 1968 but turns against petitioners point by point.

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[15] S. Rep. No. 1201, 89th Cong., 2d Sess., p. 2.

[16] H. R. Rep. No. 1114, 89th Cong., 1st Sess., p. 4:

"The machinery established in the law can work expeditiously. For example, . . . (t)he Second Division, which handles an average of 247 cases a year, has a backlog of little over 1 year's work."

III. THE COURTS BELOW CORRECTLY HELD THAT PETITIONERS' FAILURE TO USE CONTRACTUAL GRIEVANCE PROCEDURES FORECLOSED JURISDICTION OVER THEIR CLAIM IN THE FEDERAL COURTS.

This Court recently held in *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965):

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must **attempt** use of the contract grievance procedure agreed upon by employer and union as the mode of redress. . . . And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."
>
> 379 U. S., pp. 652-653 (emphasis in text).

Shortly afterward in *Vaca v. Sipes*, 386 U. S. 171 (1967), this Court stated that the *Maddox* rule was settled:

> "Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp. v. Maddox* . . ."
>
> 386 U. S., pp. 184-185.

According to clear acknowledgments in the complaint as amended petitioners had two separate grievance procedures available to them which they did not use. First, petitioners could have filed with the union their grievance

for the union to process for them. Second, petitioners by themselves could have presented their grievance directly to the company. The allegations in the complaint make it abundantly clear that petitioners did not attempt to file a formal grievance under either procedure. As an excuse for their inaction, petitioners allege merely that the hostile attitudes of certain "representatives" of the union and the company discouraged them and made them feel that pursuit of the grievance under the contract procedures would be "useless." There is no allegation that these "representatives" would have had any role whatever in making decisions regarding petitioners' claim had they attempted to file it under either procedure. On these facts and admissions appearing on the face of the complaint it is impossible for petitioners to contend that they attempted use of the contractual grievance procedures as required by *Maddox* and *Vaca* as a prerequisite to court suit. Nor do they.

Instead petitioners argue that as railroad employees under *Walker v. Southern R. Co.*, 385 U. S. 196 (1966) they "are outside the purview" of *Maddox*. (Brief p. 10.) This contention is untenable. First, the holding of *Walker* is extremely narrow, limited to the facts of that particular case. Second, the facts emphasized in that case were that Walker was suing for wrongful discharge, that the appeal opportunities from the Adjustment Board were unequal, and that the First Division of the Board to whom Walker, a fireman, was required to go was seven and one-half years behind in its work. These facts for reasons stated above are not present in this case.[17]

The weakness of petitioners' argument that the rule of *Maddox* and *Vaca* does not apply to this case is made even more apparent by both the provisions of the Railway Labor Act and the particular facts of this case. First,

[17] See note 12 and text accompanying notes 13-16 above.

the Railway Labor Act unlike the National Labor Relations Act construed in *Maddox* and *Vaca* expressly provides in absolute terms that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements . . . shall be handled in the usual manner up to and including the chief operating officer of the carriers designated to handle such disputes. . . ."[18] It is impossible to find in this mandate or any policy behind the Act any reason whatever for not applying the rule of *Maddox* and *Vaca* to this and other railroad cases. In fact, failure to do so would only mean an increase in the number of meritless claims filed before the Adjustment Board thereby impeding the Congressional purpose of the 1966 amendments to expedite adjudication before the Board.[19]

Second, in the words of Mr. Justice Black, dissenting in *Maddox*, that case did not involve a dispute over "general working conditions", but rather "an ordinary, common, run-of-the-mill" dispute between an isolated employee and his former employer over wages. 379 U. S., pp. 664, 659. This case on the other hand pits an entire class of active employees against their employer in a dispute over their promotional rights and future employment relationship. It is this type of dispute, even more than the dispute in *Maddox*, which in the absence of the *Maddox* rule "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." 379 U. S. at 652, quoting *Teamsters Local v. Lucas Flour Co.*, 369 U. S. 95, 103.

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[18] Railway Labor Act, Sec. 3 First (i), 45 U. S. C. 153, First (i).

[19] See S. Rep. No. 1201, 89th Cong., 2d Sess., p. 2:

> "The committee believes that the merits of every claim should be carefully considered by both the carrier and the employee representative in an attempt to solve the dispute before submission to the Board."

Third, with respect to *Vaca,* the union here unlike that in *Vaca,* does not possess the "sole power under the contract to invoke the higher stages of the grievance procedure." 386 U. S. at p. 183. By petitioners' own admission in the complaint they could have presented their grievance directly to the company without the aid of the union and under clearly established law they had the power to present their case on their own initiative to the Adjustment Board. *E. g., Thompson v. New York Central R. Co.,* 361 F. 2d 137, 143 (2d Cir. 1966). Thus in this case it is hardly an adequate excuse to avoid the *Maddox* doctrine for petitioners to allege, as they do, that the union was likely to refuse to process their grievance had they formally submitted it to the union.

Fourth, the lower federal courts have consistently held, as the courts below, that the doctrine of *Maddox* and *Vaca* is applicable in railroad cases. In *Howard v. St. Louis-San Francisco R. Co.,* 361 F. 2d 905 (8th Cir. 1966), *cert. denied,* 385 U. S. 986 (1966), the Eighth Circuit in a racial discrimination case almost identical to this one relying on *Maddox,* stated: "Having failed to exhaust their contractual and administrative remedies appellant[s are] precluded from resorting to the federal courts for resolution of the grievances." *Id.* at p. 912. See also, *Pacilco v. Pennsylvania R. Co.,* 381 F. 2d 570 (2d Cir. 1967); *Belanger v. New York Central R. Co.,* 384 F. 2d 35 (6th Cir. 1967); *Wade v. Southern Pacific Co.,* 243 F. Supp. 307 (S. D. Tex. 1965).

For all these reasons the doctrine of *Maddox* and *Vaca* that employees, as a prerequisite to filing a lawsuit, must attempt to use the contract grievance procedure to settle a contractual dispute is fully applicable to this case. As the complaint manifests beyond doubt that petitioners made no attempt to invoke formally either procedure available to them, the decision below should be affirmed.

CONCLUSION.

For all of the foregoing reasons the action of the district court dismissing the complaint is wholly in accord with the provisions of the Railway Labor Act and the decisions of this Court. Accordingly, the decision below upholding the dismissal should be affirmed.

Respectfully submitted,

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Certificate of Service.

I hereby certify that copies of the foregoing Brief for Respondent St. Louis-San Francisco Railway Company has been served on counsel by mailing copies by U. S. mail, postage prepaid, to Hon. William M. Acker, Jr., 600 Title Building, Birmingham, Alabama and to Hon. Jerome A. Cooper, Cooper, Mitch & Crawford, Suite 1025 Bank for Savings Building, Birmingham, Alabama.

This the 3rd day of July, 1968.

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Of Counsel.